

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

San Francisco Division

TEJINDAR P. SINGH, RAJINDER K.  
SINGH, and THE SINGH FAMILY  
PROPERTIES, L.P.,

Plaintiffs,

v.

INDYMAC BANK, F.S.B., SPECIALIZED  
LOAN SERVICING, LLC, and AFFINIA  
DEFAULT SERVICES, LLC.,

Defendants.

Case No. 19-cv-05758-LB

**ORDER DISMISSING CASE**

Re: ECF No. 7

**INTRODUCTION**

In this lawsuit, the plaintiffs ask to enjoin IndyMac Bank and Specialized Loan Servicing from foreclosing on their real property, in part on the ground that the defendants waived their right to foreclose by not filing a compulsory cross-complaint in the plaintiffs' 2015 lawsuit in state court to quiet title to the property.<sup>1</sup> The defendants move to dismiss the complaint on two main grounds:

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<sup>1</sup> Compl., Ex. 1 to Notice of Removal – ECF No. 1 at 9–10 (¶¶ 3–6), 14 (¶¶ 21–22). Citations refer to material in the Electronic Case File (“ECF”); pinpoint citations are to the ECF-generated page numbers at the top of documents. Affinia Default Services is a nominal defendant and filed a statement of non-monetary status before IndyMac and Specialized Loan Servicing removed the case to federal court. Decl. of Non-Monetary Status, *Singh v. Indymac Bank*, Case MSC 19-01235 – Dkt. Entry 8/13/2019. All parties consented to the undersigned’s jurisdiction. Consents – ECF Nos. 5, 10, 13.

(1) the compulsory cross-complaint rule does not apply to the pending nonjudicial foreclosure, and (2) the plaintiffs are essentially challenging the assignment of the loan, and they lack standing to do so.<sup>2</sup> The court grants the motion to dismiss.

## STATEMENT

### 1. The Loan and Assignment of the Deed of Trust

The plaintiffs bought the subject property (located in Concord, California) and obtained the loan at issue in the litigation from IndyMac.<sup>3</sup> Tejinder P. Singh and Rajinder K. Singh signed the loan agreement on December 23, 2005, and it was recorded that day.<sup>4</sup> The Singh Family Properties was not a party to the loan agreement.<sup>5</sup> IndyMac assigned the deed of trust to Deutsche Bank on December 28, 2005.<sup>6</sup> It was recorded on April 13, 2018.<sup>7</sup>

### 2. The Earlier Lawsuit to Quiet Title

In August 2015, the plaintiffs sued the defendants to quiet title based on the “previously unknown encumbrance [of the mortgage reflected on the Deed of Trust that they signed in December 2005], and no entity would respond to Plaintiffs’ inquiries with a Pay Off Demand despite Plaintiffs[’] repeated requests to the address listed on the INDYMAC Deed of Trust.”<sup>8</sup> The plaintiffs then sued the defendants in state court to quiet title to remove the mortgage encumbrance

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<sup>2</sup> Mot. – ECF No. 7 at 3–4.

<sup>3</sup> Deed of Trust, Ex. 1 to Request for Judicial Notice (“RJN”) – ECF No. 8 at 6–7. The court takes judicial notice of the public-record loan and state-court documents and also can consider them under the incorporation-by-reference doctrine. *Knievel v. ESPN*, 393 F.3d 1068, 1076–77 (9th Cir. 2005); *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001). Some of the documents also are attached to the complaint. Exs. to Compl. – ECF No. 1.

<sup>4</sup> Deed of Trust, Ex. 1 to RJN – ECF No. 8 at 6, 12.

<sup>5</sup> *Id.*

<sup>6</sup> Assignment of Deed of Trust, Ex. 2 to RJN — ECF No. 8 at 27.

<sup>7</sup> *Id.*

<sup>8</sup> Compl., Ex. 1 to Notice of Removal – ECF No. 1 at 8–9 (¶ 2).

on the property.<sup>9</sup> The defendants answered the complaint but did not file a cross-complaint.<sup>10</sup> The plaintiffs ultimately requested dismissal of the complaint without prejudice,<sup>11</sup> and the court apparently dismissed the case.<sup>12</sup> The defendants apparently moved for their fees, and Rajinder Singh submitted a declaration in opposition to that fees motion and explained why he dismissed the case without prejudice (generally, he said, because the defendants could not reconvey the property).<sup>13</sup>

### 3. The Notice of Default and the Complaint Here

On February 26, 2019, Affinia Default Services, as successor trustee, recorded a substitution of trustee and a Notice of Default and Election to Sell the plaintiffs' property.<sup>14</sup>

On June 27, 2019, the plaintiffs filed this lawsuit in Contra Costa County Superior Court to enjoin the sale and obtain declaratory relief.<sup>15</sup> In addition to their allegations (described above) that they did not know about the deed of trust and asked for a pay-off demand, they "considered the INDYMAC Deed of Trust and CREDIT Line to have been obtained by embezzlement and noted that the address for billing was routed to one of their gas stations and not to their billing address, and that the name of the property was misspelled as 'Galcier court' on the loan instruments, and that no one had initialed any part of the INDYMAC DEED OF TRUST."<sup>16</sup> Nonetheless, they sought a pay-off demand.<sup>17</sup> As to the alleged fraud:

<sup>9</sup> Compl. to Quiet Title, Ex. 1 to Compl. – ECF No. 8 at 1 at 33–68.

<sup>10</sup> Answers, Exs. 5–6 to RJN – ECF No. 8 at 73–87, 89–103; Compl. Ex. 1 to Notice of Removal – ECF No. 1 at 15 (¶ 26), 69–84, 85–100.

<sup>11</sup> Request for Dismissal, Ex. 7 to RJN – ECF No. 8 at 105–06.

<sup>12</sup> Mot. – ECF No. 7 at 4.

<sup>13</sup> Deed of Trust, Ex. 1 to RJN – ECF No. 8 at 10 (¶ 10 (fees provision); Singh Decl., Ex. 5 to Compl. – ECF No. 1 at 129–35).

<sup>14</sup> Substitution of Trustee, Ex. 8 to RJN – ECF No. 8 at 110; Notice of Default – Ex. 9 to RJN – ECF No. 8 at 112–16.

<sup>15</sup> Notice of Removal – ECF No. 1 at 2 (¶ 2); Compl. – ECF No. 1 at 7.

<sup>16</sup> Compl., Ex. 1 to Notice of Removal – ECF No. 1 at 10 (¶ 7) (capitalizations in the original).

<sup>17</sup> *Id.* (¶ 8).

[a]t all times prior to filing Plaintiffs’ prior Complaint, Plaintiffs were unaware of the nature and amount of the CREDIT LINE, which had been obtained by embezzlement and falsification of documents, by Plaintiffs’ employees. Plaintiffs had not knowingly made payments on any debt secured by the INDYMAC Deed of Trust nor were Plaintiffs aware of said encumbrance.”<sup>18</sup>

IndyMac “received no payment since July of 2011, and had frozen said CREDIT LINE as of 2008 . . . .”<sup>19</sup> The defendants’ answers in the quiet-title action were a “fraud on the court” because Deutsche Bank charged off the credit line, but IndyMac never assigned the Deed of Trust to Deutsche Bank and retained it.<sup>20</sup>

They also allege that the defendants did not dispute Mr. Singh’s declaration that the defendants could not reconvey the deed because Deutsch Bank had charged off the line of credit (the loan at issue) and “[y]et said Defendants could have sought authorization from Deutsche Bank but presumably failed to request any demand from Deutsch Bank in order to receive funds and subtract servicing fees.”<sup>21</sup> Moreover, they allege, the defendants cannot seek judicial foreclosure because they did not file compulsory cross-claims in the earlier quiet-title action.<sup>22</sup>

The plaintiffs thus seek declaratory and injunctive relief “based on the preclusive effect and collateral estoppel of the prior court ruling in favor of Plaintiffs, and based on said Defendants’ deliberate failure to file compulsory cross complaints,” ask to bar “any enforcement of the Credit Line by nonjudicial foreclosure based on the INDYMAC Deed of Trust,” and ask for “quiet title relief . . . to remove the cloud of title” on their property by “nullifying the INDYMAC Deed of Trust.”<sup>23</sup> They allege that the credit line is not enforceable because the statute of limitations expired (since the last payment in 2011), because they tendered payment full payment under “Civil Codes 1511 and 1512,” and because the defendants prevented performance by not

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<sup>18</sup> *Id.* at 14–15 (¶ 23).

<sup>19</sup> *Id.* at 15 (¶ 24).

<sup>20</sup> *Id.* at 16 (¶ 27).

<sup>21</sup> *Id.* at 13–14 (¶ 18).

<sup>22</sup> *Id.* at 14 (21), 16–17 (¶¶ 28–29).

<sup>23</sup> *Id.* at 16–17 (¶ 29).

responding to the plaintiffs’ pay off demands and “later refusal to reconvey the INDYMAC Deed of Trust despite Plaintiffs’ tender of full payment.”<sup>24</sup>

The complaint has three claims: (1) a claim for temporary and permanent injunction relief to prevent foreclosure because the defendants failed to make compulsory cross-claims in the 2015 quiet-title lawsuit “and further reasons set forth in paragraph 24;” (2) a claim for injunctive relief on the same grounds and based on the defendants’ fraud by “demanding full payment without the ability to reconvey the security instrument known as the INDYMAC Deed of Trust;” and (3) a claim for declaratory relief and quiet title based on (a) “Select Loan Servicing’s”<sup>25</sup> demanding full payment of the note from the plaintiffs without tendering a reconveyance of the deed of trust, (b) the defendants’ failure to file compulsory crossclaims in the 2015 lawsuit, and (c) the defendants’ representation during the 2015 lawsuit that they represented the servicer and the note holder but actually “WERE ONLY SERVICERS, and could not reconvey the INDYMAC Deed of Trust.”<sup>26</sup>

Paragraph 24 reads in full:

At the time Plaintiffs filed Plaintiffs[’] prior complaint, August 6, 2015, Defendant INDYMAC had admittedly received no payment since July of 2011, and had frozen said CREDIT LINE as of 2008, and Plaintiffs denied knowing of said CREDIT LINE or the INDYMAC Deed of Trust until a title search in June of 2015 revealed the INDYMAC Deed of Trust. The full amount of the CREDIT LINE was due in full at the time Plaintiffs filed their prior Complaint.<sup>27</sup>

On September 13, 2019, the defendants removed the suit here based on diversity jurisdiction.<sup>28</sup> The defendants then moved to dismiss the complaint for failure to state a claim and (for the plaintiffs’ challenge to the assignment to Deutsche Bank) for lack of standing.<sup>29</sup> The court held a hearing on November 14, 2019.

<sup>24</sup> *Id.* at 17–18 (¶ 30) (capitalizations in original).

<sup>25</sup> Presumably this is a typographical error, and the plaintiffs mean the defendant, Specialized Loan Servicing.

<sup>26</sup> *Id.* at 18–25 (¶¶ 31–38, ¶¶ 25–31) (capitalization in the original). At this point in the complaint, the paragraphs go up to 38 and restart at 25 and go up to 31.

<sup>27</sup> *Id.* at 15 (¶ 24).

<sup>28</sup> Notice of Removal – ECF No. 1.

<sup>29</sup> Mot. – ECF No. 7.

## STANDARD OF REVIEW

### 1. Rule 12(b)(1)

A complaint must contain a short and plain statement of the ground for the court's jurisdiction. Fed. R. Civ. P. 8(a)(1). The plaintiff has the burden of establishing jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 912 (9th Cir. 1990).

A defendant's Rule 12(b)(1) jurisdictional attack can be either facial or factual. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). "A 'facial' attack asserts that a complaint's allegations are themselves insufficient to invoke jurisdiction, while a 'factual' attack asserts that the complaint's allegations, though adequate on their face to invoke jurisdiction, are untrue." *Courthouse News Serv. v. Planet*, 750 F.3d 776, 780 n.3 (9th Cir. 2014). This is a facial attack. The court thus "accept[s] all allegations of fact in the complaint as true and construe[s] them in the light most favorable to the plaintiffs." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003).

Standing pertains to the court's subject-matter jurisdiction and thus is properly raised in a Rule 12(b)(1) motion to dismiss. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121–22 (9th Cir. 2010).

### 2. Rule 12(b)(6)

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief" to give the defendant "fair notice" of what the claims are and the grounds upon which they rest. *See* Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint does not need detailed factual allegations, but "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a claim for relief above the speculative level[.]" *Twombly*, 550 U.S. at 555 (internal citations omitted).

To survive a motion to dismiss, a complaint must contain sufficient factual allegations, which when accepted as true, “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (citing *Twombly*, 550 U.S. at 557). “Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of ‘entitlement to relief.’” *Id.* (internal quotation marks omitted) (quoting *Twombly*, 550 U.S. at 557).

### 3. Leave to Amend

If a court dismisses a complaint, it should give leave to amend unless the “pleading could not possibly be cured by the allegation of other facts.” *United States v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1182 (9th Cir. 2016) (citations and internal quotation marks omitted). “[L]eave to amend may be denied when a plaintiff has demonstrated a ‘repeated failure to cure deficiencies by amendments previously allowed.’” *Id.* at 1183 (quoting *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003)).

## ANALYSIS

The defendants move to dismiss the complaint for two main reasons: (1) the failure to file a compulsory cross-claim in 2015 does not bar the 2019 nonjudicial foreclosure action, and (2) the plaintiffs lack standing to challenge the assignment of the loan.<sup>30</sup> The court grants the motion on both grounds.

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<sup>30</sup> Mot. – ECF No. 7 at 6–10.

1 First, the plaintiffs essentially invoke collateral estoppel — based on a 2015 quiet-title lawsuit  
2 that they dismissed without prejudice — because the defendants did not cross-claim for judicial  
3 foreclosure. That argument fails.

4 California Code of Civil Procedure 426.30(a) requires a defendant “to allege in a cross-  
5 complaint any related cause of action which (at the time of serving his answer to the complaint) he  
6 has against the plaintiff,” and if he does not, the defendant “may not thereafter in any other action  
7 assert against the plaintiff the related cause of action not pleaded.”<sup>31</sup> Cal. Code Civ. P. 426.30(a);  
8 *Crocker Nat. Bank v. Emerald*, 221 Cal. App. 3d 852, 864 (1990). A “related cause of action” is “a  
9 cause of action which arises out of the same transaction, occurrence or series of transactions or  
10 occurrences as the cause of action which the plaintiff alleges in his complaint. Cal. Code Civ. P.  
11 426.10(c). As the defendants point out, a nonjudicial foreclosure action is not a judicial action  
12 under California law. *See, e.g., Rieger v. Wells Fargo Bank, Nat. Assoc.*, No. 3:13-0749-JSC, 2013  
13 WL 1748045, at \*5 (N.D. Cal. Apr. 23, 2013) (“It is well-established that California’s nonjudicial  
14 foreclosure statutes, California Civil Code sections 2924 through 2924(k), exclusively govern  
15 nonjudicial foreclosures.”) (citing *Moeller v. Lien*, 25 Cal. App. 4th 822, 831 (1994). Moreover,  
16 even if it were, the rule does not bar later-acquired claims. *See Crocker*, 221 Cal. App. 3d at 864  
17 (“[Defendant] filed his answer in August 1980, and the second and third causes of action are based  
18 on actions which allegedly took place in February 1982. Therefore, [defendant]’s second and third  
19 causes of action are not compulsory cross-complaints”). This is a later-acquired claim.

20 The court thus dismisses the claims to the extent that they are predicated on the defendants’  
21 failure to bring cross-claims in the 2015 quiet-title action.

22 Second, the plaintiffs want to quiet title by removing the deed of trust as an encumbrance. As a  
23 ground for that claim, they allege in part that the defendants are only loan servicers and cannot  
24 assert Deutsche Bank’s right to foreclose on the deed of trust.<sup>32</sup> The defendants contend that the  
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26 <sup>31</sup> The parties do not address whether collateral estoppel applies here, where the plaintiffs dismissed  
27 the complaint without prejudice.

28 <sup>32</sup> *See* Mot. – ECF No. 7 at 8–9; Reply – ECF No. 14 at 4–5.



plaintiffs are challenging their authority to act on the subject loan, and, citing *Jenkins v. JP Morgan Chase Bank, N.A.*, argue that the plaintiffs lack standing to challenge their authority because they are third-party beneficiaries.<sup>33</sup> See 216 Cal. App. 4th 497, 513–16 (2013). The plaintiffs say that they are not challenging the assignment and instead raise it as part of their estoppel argument that the court rejected in the previous section.<sup>34</sup> Because the court rejects the estoppel argument, the assignment issue is academic, but the plaintiffs lack standing to attack the assignment in any event. As the court understood the argument, it is the plaintiffs’ contention that IndyMac had the obligation to make the cross-claim in the 2015 lawsuit — even with an assignment to Deutsche Bank — because the assignment was not recorded until April 13, 2018. Even if the defendants recorded the assignment late, the assignment is not void, only voidable, which means that the plaintiffs do not have standing to attack it in a wrongful-foreclosure claim. *Asturias v. Nationstar Mortg. LLC*, No. 15-cv-03861-RS, 2016 WL 7175622, at \*3 (N.D. Cal. Dec. 8, 2016) (citing *Saterbak v. JPMorgan Chase Bank, N.A.*, 245 Cal. App. 4th 808, 815 (2016) and *Yvanova v. New Century Mortg. Corp.*, 62 Cal. 4th 919, 942–43 (2016)); see *Yvanova*, 62 Cal. 4th at 942–43) (“We conclude a home loan borrower has standing to claim a nonjudicial foreclosure was wrongful because an assignment by which the foreclosing party purportedly took a beneficial interest in a deed of trust was not merely voidable but void. . . .”); see also *In re Turner v. Wells Fargo Bank, N.A.*, 859 F.3d 1145, 1149–50 (9th Cir. 2017) (discussing *Saterbak*, *Yvanova*, and *Jenkins*).

The court cannot discern any other basis for the plaintiffs’ quiet-title claim. Generally, for actions in equity, a borrower who seeks to quiet title and set aside instruments such as the Notice here must plead a present ability to tender the full amount of the debt. *Green v. Central Mortg. Co.*, 148 F. Supp. 3d 852, 869 (N.D. Cal. 2015) (citations omitted). There are exceptions, such as a borrower’s attack on the underlying debt. *Id.* (citations omitted). The inquiry is within the court’s discretion, especially at the pleadings stage. *Id.* at 870. But the plaintiffs advance no viable theory.

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<sup>33</sup> Mot. – ECF No. 7 at 8–9.

<sup>34</sup> Opp’n – ECF No. 11 at 5.

1 Their allegations about tender and the illegality of the debt are conclusory and do not plausibly  
2 attack the underlying debt. The court dismisses the claim.

3 The defendants also contend that IndyMac has no association with the loan because IndyMac  
4 assigned it to Deutsche Bank in 2005. Under circumstances like these, courts dismiss defendants  
5 like IndyMac. *See, e.g., Suruki v. Ocwen Loan Servicing, LLC*, No. 15-cv-00773-JST, 2016 WL  
6 7741734, at \*5 (N.D. Cal. July 22, 2016). The court dismisses the claims against IndyMac.

7 Finally, the plaintiffs argue that the statute of limitations bars the nonjudicial foreclosure.<sup>35</sup>  
8 The statute of limitations might bar a judicial foreclosure, but it does not bar a nonjudicial  
9 foreclosure. Cal. Civ. Code § 2911; *Rieger*, 2013 WL 1748045, at \*5 (California's nonjudicial  
10 foreclosure statutes exclusively govern nonjudicial foreclosures); *Ung v. Koehler*, 135 Cal. App.  
11 4th 186, 192–193 (2005).

### 12 CONCLUSION

13 The court grants the motion to dismiss. To the extent that the claims are predicated on the  
14 estoppel, assignment, and statute-of-limitations contentions, the dismissal is with prejudice  
15 because the plaintiffs cannot cure the legal deficiencies in their claims with additional fact  
16 allegations. The dismissal of claims against IndyMac is with prejudice for the same reason. The  
17 plaintiffs may file an amended complaint in 21 days. If they file an amended complaint, they must  
18 file as an attachment a blackline of the amended complaint against the current complaint. If they  
19 do not file an amended complaint in 21 days, the court will enter judgment in favor of the  
20 defendants.

21 **IT IS SO ORDERED.**

22 Dated: November 15, 2019

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24  
25 LAUREL BEELER  
26 United States Magistrate Judge

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28 <sup>35</sup> Compl. – ECF No. 1 at 17–18 (¶ 30).